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Colin P. Stevenson

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A NEW PERSPECTIVE ON ENVIRONMENTAL RIGHTS AFTER THE CHARTER

By COLIN P. STEVENSON*

I. INTRODUCTION

Everyday some new environmental abuse is reported. Stories of insidious seepage of industrial waste,¹ the continuing deluge of acid rain² and the seemingly ceaseless spraying of potentially carcinogenic pesticides³ anger and horrify all.

Despite widespread disapprobation however, the onslaught continues relentlessly, apparently irrespective of the legal measures called in aid to restrain the environmental degradation.

This article will suggest that the new Canadian Constitution, which was finally patriated by the *Constitution Act, 1982*,⁴ has provided a new source of environmental rights which have the potential to serve as effective devices of pollution control.

The first part of the paper will discuss the concept of a constitutional environmental right in order that its role in the field of environmental protection can be put in perspective vis-a-vis the more traditional legal and economic protection techniques. The second part will examine the new constitutional framework and suggest that active judicial review is both a positive and a realistic proposition. This will be illustrated not only by the substantive provisions of the *Constitution Act* itself but also by the historical development of the Irish Constitution which came into force in 1937 subject to the control of a positivist judiciary trained in the British legal tradition. The Irish Constitution has since been transformed into a dynamic source of fundamental rights and a powerful vindicator of civil liberties by a judiciary which quickly developed its own distinctive constitutional jurisprudence. By analogy it will be suggested

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*Mr. Stevenson was a successful candidate for an LL.M. at Osgoode Hall Law School 1982-1983, and is currently Lecturer in Law at University College Cork, Eire.

¹ Such as that presently occurring at the Hyde Park landfill site which gave rise to the recent litigation in the United States: *United States v. Hooker Chemicals and Plastics Corporation* (1982), 11 C.E.L.R. 59 (W. Dist. Ct. of N.Y.). See also 6, CELA Newsletter, 1981 at 42-44, 68-69 and 111-13.

² Concern here is running so high that the topic recently made the front page of *Time*, 8 Nov. 1982. For a legal treatment see Van Lier, *Acid Rain and International Law* (Toronto: Bunsel Environmental Consultants, 1981), and for a list of government reports see Swaigen, *Environmental Law 1975-1980* (1980), 12 Ott. L. Rev. 439 at n. 183.

³ An interlocutory injunction was recently granted by Burchell J. in the Supreme Court of Nova Scotia to restrain spraying of the herbicides 2, 4-D and 2, 4, 5-T. See 1982, 11 C.E.L.R. 141. However, it is doubtful whether the appeal court which heard the case on Dec. 6, 1982, will allow the decision to stand.

⁴ Which was brought into force by the proclamation of April 17, 1982 — see s. 1 of Sched. B of the *Canada Act 1982*, c. 11 (U.K.).

that it is possible and, as the first part will have already argued, desirable to develop a constitutional environmental right in Canada.

Finally, the third part of the paper will look at a number of alternative formulations that such a right could take. Having regard to the limitations of judicial review it seems unlikely that a right to a clean environment *per se* will develop through judicial activism. Instead it would appear that any constitutional environmental rights are likely to be of a rather more limited application. Thus, in conclusion, it will be suggested that the new Constitution has introduced, at the very least, procedural due process and may perhaps have even gone so far as to establish certain substantive rights such as the right to bodily integrity and the right not to have one's health jeopardized. While these may not be of such general application to environmental problems as a right to a clean environment they would certainly prove to be welcome additions to the environmental lawyer's stock of available remedial devices.

Perhaps even more importantly than operating as devices to curb pollution these rights would act as powerful catalysts stimulating the more effective enforcement of presently existing environmental protection laws, while encouraging their evolution to a state in which they no longer flatter to deceive but justify the high hopes and claims of the draftsmen and legislators.

This is not to suggest that constitutional environmental rights should be viewed as an alternative to existing or proposed environmental protection regimes. Nor is it contended that one should be a substitute for the other, but rather that they should work hand in glove in pursuit of their common objective.

To this end, therefore, the following will deal only briefly with the defects and lacunae of environmental protection techniques. The issue is raised only to highlight the recurring problems of the lack of political will and the unjustifiably strong position of traditional legal rights. The latter is epitomized by the weakness of private nuisance as an action to control pollution, stemming to a large extent from the conventional judicial emphasis on the right to use one's own property as one sees fit.

These general problems associated with existing environmental protection techniques should be seen as a foil to set off the advantages of a constitutional environmental right which, it is contended, can go a long way towards producing responsive and responsible environmental protection.

In support of this thesis three questions shall be addressed:

Is it desirable to entrench environmental rights in the Constitution or are alternative methods of environmental protection to be preferred?

If environmental rights are appropriate how may their recognition or development best be effected?

What character should these constitutional environmental rights take?

II. ARE CONSTITUTIONAL ENVIRONMENTAL RIGHTS DESIRABLE?

As proposed above, certain defects of the existing legal regime will be highlighted first in order better to illustrate the advantages and application of the proposed constitutional rights.

Present methods of environmental protection may be divided into two categories.

A. *economic manipulation*: that makes use of such techniques as economic incentives and disincentives, fines, effluent fees, licences, user charges, loans and grants to reduce a level of pollution to desired standards and,

B. *legal rights*: that are recognized either at common law or created by statute and that, as a corollary, raise a duty in others, the breach of which renders the offender liable either to prosecution or to an action for damages.

A. *The Economic Approach*

The economists suggest that economic manipulation of industry is the most efficient means of regulating pollution. Neo-classical economists argue that inefficiency in resource allocation is the primary reason for the unacceptable level of environmental degradation.⁵ This inefficiency results from market distortions created by the existence of "externalities". Pollution is encouraged because the polluter can discharge effluent at no cost to himself, that is, he acquires a benefit free of charge while a cost accrues to others: namely the consequences of environmental degradation to the public.

An efficient level of pollution therefore, will only be achieved when these external diseconomies are internalized. This requires government intervention to regulate property rights⁶ and to remedy the market distortions. In the absence of such intervention industry will ignore the social costs of production because it is in their interests to do so. The introduction of a pollution tax therefore, will internalize these "externalities" and an efficient level of pollution will result when the marginal cost of pollution control equals the marginal benefit accruing from pollution abatement. This approach is quite common in certain European countries⁷ and has been recommended as ripe for application in Canada as a means of encouraging, *inter alia*, responsible environmental decision making.⁸

However, there are a number of problems associated with such market-oriented techniques. Considerable problems of implementation would arise given that such markets do not as yet exist and obstacles to the creation of

⁵ See, e.g., Coase, *The Problem of Social Cost* (1960), 3 J. Law & Econ. 1 and Hardin, *The Tragedy of the Commons* (1968), 162 Science 1234.

⁶ The idea of creating pollution rights analogous to property rights is discussed by Dales, *Pollution, Property & Prices* (Toronto: Univ. of Tor. Press, 1968).

⁷ For a summary of these and for further references see Irwin and Liroff, *Economic Disincentives for Pollution Control: Legal, Political and Administrative Dimensions* (Washington, D.C.: U.S. Env. Protec. Agency, 1974) ch. 3.

⁸ Emond, "Accountability and the Environmental Decision Making Process," in Swaigen, ed., *Environmental Rights in Canada* (Toronto: Butterworths, 1981) at 406 [hereinafter Swaigen].

Note also that Ontario government economists recommended the application of "pollution control delay" penalties to the pulp and paper industry (not implemented) and that the *Canada Water Act*, R.S.C. 1970 (1st Supp.), c. 5 authorizes the, as yet unused, power to introduce effluent charges.

them would be found in the form of "transaction costs,"⁹ that is, the costs of running and operating markets. Implementation would also be hindered by the inevitable political opposition to interference with what are presently categorized as individual property rights. Important also is the fear that these economic approaches would legitimize pollution and establish what might be characterized as a right to pollute or at the very least, a licence to pollute.

Many environmentalists object to the wholesale application of cost/benefit analysis to environmental issues as they consider it an inappropriate tool by which to compare such divergent interests.¹⁰ They argue that it is impossible to quantify many environmental values particularly where they involve aesthetic considerations. Similarly, such analysis often ignores the costs of future adverse environmental impacts which may subsequently arise.¹¹

The Canadian experience in pollution control has not been encouraging. Individual provinces have manipulated grants, stumpage rates, taxes and regulations in efforts to entice and support new industry,¹² a fact which not only leads to an inability of governments to work together but also militates against effective environmental protection.¹³

The economic approach to environmental protection is essentially negative and should be contrasted to the assertion of the constitutional right which would be cast in positive terms and which is therefore, it will be suggested later, much more conducive to the propagation of an environmental ethic, that is, public appreciation of and commitment to the environment.

Another problem with the economic approach is that it tends to restrict judicial creativity. The courts are notoriously reluctant to interfere in economic matters. The judiciary properly¹⁴ do not view the courtroom as the appropriate forum for the resolution of economic and political disputes. That is essentially the exclusive domain of the executive and the legislature. Thus, if economic mechanisms were implemented to reduce the level of pollution to a level of efficiency commensurate with its social cost the courts might, through self restraint if nothing else, find their role in the field of environmental protection considerably constrained. This would result in decreased exposure to environmental cases and a lessening of the judiciary's already incomplete ap-

⁹ See Valjanovski, *The Economic Approach to Law: A Critical Introduction* (1980), 7 Brit. J. Law & Soc. 158 at 171. For a neo-Marxist criticism see England and Bluestone, "Ecology and Social Conflict," in Daly, ed., *Toward a Steady-State Economy* (San Francisco: W.H. Freeman, 1973) 190.

¹⁰ See in particular Tribe, *Ways Not to Think About Plastic Trees: New Foundations for Environmental Law* (1974), 83 Yale L.J. 1315 and Sagoff, *On Preserving the Natural Environment* (1974), 84 Yale L.J. 205.

¹¹ Gelpe and Tarlock, *The Uses of Scientific Information in Environmental Decision making* (1974), 48 So. Calif. L. Rev. 371 at n. 118.

¹² See *The Globe and Mail* (Toronto), July 25, 1980 at 7, col. 1.

¹³ See text accompanying note 114, *infra* for further discussion.

¹⁴ Where the courts have intervened on economic issues the results have sometimes been far from satisfactory. See, e.g., *Canadian Industrial Gas & Oil Ltd. v. Gov't. of Sask.*, [1978] 2 S.C.R. 545, 80 D.L.R. (3d) 449, [1977] 6 W.W.R. 607 and a criticism of the case by Paus-Jenssen, *Resource Taxation and the Supreme Court of Canada: The Cigol Case* (1979), 5 Can. Pub. Pol. 45.

preciation of the issues involved. Unfortunate consequences might arise in the simultaneous restriction of judicial activism in other areas of environmental law, such as the use of common law remedies as devices to control pollution.

Suffice it to say that these arguments are not meant to deny the usefulness of economic techniques of environmental protection. The point is that such techniques are not in themselves enough to effect the appropriate social changes necessary to ensure an habitable environment of the desirable quality and, therefore, should not be given independent application. Instead, they should be introduced in conjunction with other devices.

B. *Legal Rights*

1. Legislative measures

The second alternative is that which is often classified as an environmental bill of rights.¹⁵ The basis of this idea is that the right to an hospitable and habitable environment is just as much a fundamental civil right as the more traditional civil liberties, such as freedom of expression or freedom of association. In Canada this argument is applied not so much to demand the fundamental constitutional right with which this paper is directly concerned; instead, the environmental bill of rights is more commonly used to describe the enactment and enforcement of comprehensive environmental protection legislation and indeed this was the phrase the Ontario government used to introduce the *Environmental Protection Act* of 1971.¹⁶

Whatever the defects in this particular statute it has been argued that the concept of legal rights is the best possible approach to environmental protection as it is only by this means that environmental rights can adequately be established, evolved and enforced.¹⁷

It was with this in mind that Professor Sax drafted and Michigan enacted the *Environmental Protection Act of 1970*¹⁸ which subsequently prompted Minnesota to produce similar legislation (Minnesota's *Environmental Rights Act*).¹⁹ (Hereinafter M.E.P.A. and M.E.R.A., respectively).

However, while it is certainly true that such legislation is an absolutely vital component in the machinery of environmental protection the point once again must be made that by itself such legislation is not enough. In the first place one must recognize the unresponsiveness of the legislature to demands for innovative environmental legislation in the face of industry opposition.²⁰ Often industrial "muscle" may be such as to emasculate any provisions. This is illustrated by the ability of the powerful Canadian pulp and paper industry

¹⁵ The use of this phrase should be distinguished from its meaning in a constitutional context — see text accompanying note 55, *infra*.

¹⁶ R.S.O. 1980, c. 141. Although the Act is neither comprehensive nor, for that matter, rigorously enforced.

¹⁷ See Swaigen and Woods, "A Substantive Right to Environmental Quality," in Swaigen, *supra* note 8, at 221-32, in particular nn. 101-106.

¹⁸ Mich. Code Ann. tit. §691.1201 (1970).

¹⁹ Minn. Stat. §§116 B.01-.13 (1976).

²⁰ Even though such opposition may often be irrational given the cost effectiveness of pollution control. See *Pollution Prevention Pays* (1980), 5 C.E.L.N. 81.

to influence the content of regulations issued by the Federal Government pursuant to the *Fisheries Act*.²¹ Thus, the *Pulp and Paper Effluent Regulations*²² were produced through the collaborative efforts of the Federal Government and the Canadian Pulp and Paper Association. Not only can one be unsure whether the standards set truly reflect a desire to protect the environment from wanton degradation but any doubts are exacerbated by the fact that these regulations apply to new or altered mills only.

Furthermore bills are unlikely to make it to the statute book unless the political conditions are right, no matter how immediate the problem. The history of Bill 101 in the British Columbia legislature reflects this problem. The bill, entitled the *Environmental Bill of Rights Act, 1971*,²³ was introduced by Mr. MacDonald of the New Democratic Party (hereinafter the N.D.P.) but was never enacted. When the N.D.P. came to power two years later MacDonald was appointed to Cabinet but the government made no attempt to reintroduce the Bill. However Mr. Gardom, of the Social Credit Party, introduced an almost identical bill²⁴ which, needless to say, never made it to the statute book. Nor, for that matter, did any similar bill when that party subsequently regained power and appointed Gardom Attorney-General.

Even where measures are enacted they are usually in attenuated form and are so blunt as to be ineffective. For instance, on the face of it section 3 of the Ontario *Environmental Assessment Act*²⁵ introduces a widespread requirement of Environmental Impact Assessment (hereinafter E.I.A.) which includes provincial projects within its ambit. In reality E.I.A. is the exception rather than the rule and in the five years preceding 1981 there were 206 exemptions granted while only three hearings²⁶ were held.

As a corollary to the issues above there is also the problem of enforcement, or rather the lack of it, that all too often characterizes environmental legislation. The appropriate body to enforce legislation is often a government agency which, naturally enough, is sensitive to the existing political climate and can often avoid its responsibilities because of the very wide discretion habitually granted to them by environmental statutes.

Experience with M.E.P.A.²⁷ and M.E.R.A.²⁸ has also been such as to suggest that the idea of comprehensive legislation, which dispenses with tradi-

²¹ R.S.C. 1970, c. F-14, as am. by S.C. 1976-77, c. 35.

²² CRC 1978, c. 830. See also the *Chlor-Alkali Mercury Regulations*, CRC 1978, c. 811. Both are discussed in Estrin and Swaigen, eds., *Environment on Trial*. (Toronto: C.E.L.R.F., 1974) at 95-96 [hereinafter cited as *Environment on Trial*].

²³ Bill 101, 1971 (29th Parl. 2d Sess.).

²⁴ Bill 79, 1973 (30th Parl. 2d Sess.).

²⁵ R.S.O. 1980, c. 140.

²⁶ The excuse was invariably undue delay. The question now is whether the *Consolidated Hearings Act*, S.O. 1981, c. 20 will speed up the process by enabling one hearing to be substituted for the series of hearings previously required in order to comply with the Planning Acts as well as with the *Environmental Assessment Act*.

For a critique of the latter see Samuels, *Environmental Assessment in Ontario: Myth or Reality?* (1978), 56 Can. B. Rev. 523.

²⁷ *Supra* note 18.

²⁸ *Supra* note 19.

tional standing requirements is not in itself enough to remedy the defects in any existing environmental protection regime. Although three studies²⁹ of early litigation under the Acts conclude that they have generally proved successful, it is suggested that Bryden³⁰ is more convincing in an analysis which is much more critical of the Acts' achievements.

Bryden studied litigation in which the Acts were in issue and concluded that neither had fulfilled the expectations of the legislation's proponents. Indeed, specifically with reference to M.E.R.A., and having resolved any uncertainties in favour of the beneficial effect of the legislation, he noted that:

one must still conclude that the direct, immediate effects of MERA litigation on the overall quality of Minnesota's environment have been insubstantial.³¹

It seems, therefore, that on analysis the Acts' impact has been far from outstanding and the general conclusion must be that while these statutes have certainly opened the judicial process to environmental actions most claims are still decided on other legal arguments. In general, the legislation has not proved to be a fount of important legal principles to aid the subsequent development of environmental law.

Yet another problem is raised by questions of jurisdictional competence which too often confuse and overshadow the basic environmental problem.³²

It is suggested that something more is needed to breathe vitality into the legislative process and into the enactments resulting therefrom. One possible answer lies in the establishment of some form of a constitutional right to a clean environment.

2. Advantages of such an entrenched constitutional right

Constitutions recognize or establish³³ fundamental rights which require judicial application, interpretation and protection as well as erecting the political framework within which society is to be regulated. Consequently, constitutional provisions may be said to reflect the underlying values of society.

To the extent that a constitution recognizes fundamental rights it is suggested that, initially at least, this has primarily an *indirect* effect:³⁴ it accords

²⁹ The whole debate about the effectiveness of MEPA and MERA is discussed by Swaigen and Woods, in Swaigen, *supra* note 8, at 213-21.

The three studies in question are Sax and Connor, *Michigan's Environmental Protection Act of 1970: A Progress Report* (1972), 70 Mich. L. Rev. 1003; Sax and DiMento, *Environmental Citizen Suits: Three Years' Experience Under the Michigan Environmental Protection Act* (1974), 4 Ecol. L.Q. 1; Haynes, *Michigan's Environmental Protection Act in its Sixth Year: Substantive Environmental Law from Citizen Suits* (1975), 53 J. Urban L. 589.

³⁰ Bryden, *Environmental Rights in Theory and Practice* (1978), 62 Minn. L. Rev. 163.

³¹ *Id.* at 213.

³² See, e.g., *Interprovincial Co-operatives Ltd. v. The Queen*, [1976] 1 S.C.R. 477, 53 D.L.R. (3d) 321, [1975] 5 W.W.R. 382, and see also text accompanying note 114, *infra*, to the effect that squabbling over the actual jurisdictional forum often restricts the exercise of the regulatory power in question.

³³ Depending upon one's philosophical position.

³⁴ This point is also made by Sax, *Defending the Environment* (New York: Alfred A. Knopf, Inc., 1970) at 235 [hereinafter cited as Sax] and by Swaigen and Woods, *supra* note 17, at 200.

such rights greater *moral authority* than those not recognized and simultaneously ensures that they receive more widespread respect and appreciation. Thus the prime value of recognizing a constitutional right to a clean environment would be to catalyze the further development of the *environmental ethic*. Once a right becomes entrenched in a written constitution and is afforded recognition in the ultimate law of the State it is suggested that there is a positive feedback in that the value which society places on the particular right is substantially increased. One of the most important features of a constitutional right to a clean environment, or to some such similar right,³⁵ must be to play this educational role.

While constitutional rights do represent a society's fundamental values this does not mean that those values are necessarily apparent on the face of that society. The institutions of State may sometimes have to lead society in search of perceived higher values and ideals as the United States Supreme Court did in *Brown v. Board of Education*,³⁶ *Baker v. Carr*³⁷ and *Roe v. Wade*.³⁸

Similarly, if a constitutional right to a clean environment existed, it would serve to foster a greater public appreciation of the environment and to ensure fuller realization of the present and potential threats to the environment and, ultimately, to society itself. This in turn would lead to a greater level of environmental awareness in the legislatures and would, therefore, serve to stimulate the legislative reforms mentioned above, whether in the form of specific legal rights or market-oriented techniques of pollution control or both.

Initially therefore, the constitutional environmental right would be primarily a policy instrument propagating the environmental ethic.

It is suggested, however, that it would have both legal and extra-legal ramifications. The extra-legal educational function has been alluded to earlier, as has one aspect of the legal consequences, namely the enactment of further environmental protection legislation.³⁹

A number of other legal consequences could possibly result depending on the activism of the judiciary. Thus the constitutional environmental right could be used to protect environmental values in the face of more traditional legal concerns, that is, the constitutional right would give the judiciary a cornerstone around which to build an environmental counterbalance to set against the traditional legal rights, in particular, the right to use one's property as one desires. One possible consequence might be a more environmentally enlightened application of the balance of convenience test on an application for an interlocutory injunction. When a constitutional right is one of the factors to be taken into account the environment will obviously be accorded greater weight than it would were the particular environment right merely a legal one.

³⁵ Other rights which will be proposed later will be the right to bodily integrity and the right not to have one's life put in jeopardy.

³⁶ 347 U.S. 483, 74 S. Ct. 686 (1954), racial equality.

³⁷ 369 U.S. 186 (1962), gerrymandering.

³⁸ 410 U.S. 113 (1973), abortion and personal privacy.

³⁹ See text accompanying note 35, *supra*.

Similarly, it might allow the courts to exercise their equitable jurisdiction to grant injunctions more imaginatively. At present they appear to behave like a simple binary computer with only an on-off function allowing themselves no discretion in the applicable remedy.⁴⁰ Alternatively, the constitutional environmental right could be applied to enable the courts to develop a wider definition of nuisance or perhaps to shift the burden of proof in environmental litigation.

Sax argues that a constitutional environmental right is "sentimentalism."⁴¹ Thus, while he accepts that:

[C]onstitutional recognition of the right to a decent environment would betoken our good intentions and help to set before us a goal toward which our society ought to aspire,⁴²

he suggests that such a declaration is no substitute for the "nitty gritty" of hard and fast rules established by legislation. However, as already argued, it is not contended that one should be a substitute for the other, rather that they should work in harness with one complementing the other.

Sax also argues that such a constitutional environmental right would have no substantive effect because it lacks the:

[C]ontent that surrounds constitutional provisions like those governing free speech or the free exercise of religion, which, for all their uncertainty, incorporate specific historical experiences that infuse meaning based on a common understanding within the community.⁴³

However, given a common commitment to conservation and protection of the environment, which Sax himself concedes,⁴⁴ why should a constitutional environmental right not be adopted and developed as the United States' courts once had to do with all other constitutional provisions? The constitutional environmental right is not being proposed as a panacea for all our environmental ailments but rather as a necessary backdrop against which other measures can be seen in proper relief. Sax's argument has also been made by Swaigen and Woods⁴⁵ who suggest that:

[B]ecause of the breadth and abstractness of such a concept, it is possible that a right, although expressed in terms indicating a "substantive" interpretation, will not dictate a particular result in specific cases.

While this could well be true in the short term it must be conceded to be at least possible that in the long term the courts can crystallize the appropriate principles to ensure appropriate environmental protection. To say otherwise is to concede the race before the starting gun has even been fired.

Professor Sax also fears granting ultimate authority on environmental matters⁴⁶ to the courts lest they return to their attitude in the pre-New Deal era

⁴⁰ See *Boomer v. Atlantic Cement Co.* 257 N.E. 2d 219, 26 N.Y. 2d 219, 309 NYS 2d 312 (N.Y.C.A. 1970); and for the opposite view see *McKie v. The K. V.P. Co.*, [1949] S.C.R. 698, [1948] O.R. 398, [1948] 3 D.L.R. 201; and *Bellew v. Cement Limited*, [1948] I.R. 61 (S.C.).

⁴¹ Sax, *supra* note 34, at 234.

⁴² *Id.* at 235.

⁴³ *Id.* at 236.

⁴⁴ *Id.* at 235.

⁴⁵ *Supra* note 17.

⁴⁶ Sax, *supra* note 34, at 237-38.

epitomized by *Lochner v. New York*⁴⁷ (hereinafter cited as *Lochner*). This position was also echoed by Justice Black, dissenting, in *Griswold v. Connecticut*⁴⁸ and essentially amounts to a refusal by the judiciary to interfere with government activity which adversely affects *laissez faire* economic policies.

Canada's Supreme Court does not have such a disreputable past to live down and environmental issues are more than simply questions of economics. They also concern vital questions of civil liberties with which the courts are traditionally concerned. Sax is quite right when he argues that the environmentalist's goal is "to improve and provoke the democratic process, not to constrain it;"⁴⁹ however, it is suggested that a constitutional environmental right will operate in the former direction, not the latter.

Sax also asserts that:

[T]here is a fundamental difference between almost all environmental problems and the issues to which the [United States] bill of rights, so often used as an analogy, is addressed. Essentially, the bill of rights deals with the problems of permanent minorities and with government oppression of unpopular individuals or groups.⁵⁰

Consequently the courts only have a constitutional mandate in such circumstances. Presumably he has revised his opinion in the light of *Regents of the University of California v. Bakke*⁵¹ in which the United States Supreme Court struck down as unconstitutional the admissions programme at Davis medical school which, by implementing a quota for minority applicants, individually discriminated against the *majority* white caucasian applicants. Thus, as Justice Powell states: "The guarantees of the Fourteenth Amendment extend to all persons."⁵²

It is suggested that none of these arguments should be allowed to reduce the concept of a constitutional environmental right to mere sentimentality. However a real objection (and one that Sax notes)⁵³ is that a constitutional right in itself is of little value. Judicial activism is also required, as witnessed by the existence of the various civil rights protected by the United States Constitution but which only became prominent by the "staggering performance" of the Warren Court.

This requirement of judicial activism falls to be discussed under the rubric of the second question, that is, how to entrench the constitutional environmental right.

C. Conclusion

The conclusion therefore, is that no real objection exists to the formulation of a constitutional environmental right. Indeed, not only is it not detrimental to possible development of the law, but it is suggested that it would be beneficial both as a source of impetus for the extra-legal development of an environmental ethic and as a basis for the positive development of environmental law in general.

⁴⁷ 198 U.S. 45, 25 S. Ct. 539 (1905).

⁴⁸ 381 U.S. 479 at 507, 85 S. Ct. 1678 at 1694 (1965).

⁴⁹ Sax, *supra* note 34, at 235.

⁵⁰ *Id.* at 239.

⁵¹ 438 U.S. 265 (1978).

⁵² *Id.* at 289.

⁵³ Sax, *supra* note 34, at 235.

This is particularly so given the trend in recent (but pre-Charter) constitutional cases to liberalize the concept of "standing". One of the recurring problems in environmental litigation has been the refusal of Attorneys-General to act or give their consent to a relator action in the face of a public nuisance,⁵⁴ or to prosecute under the Environmental Protection legislation where in some provinces the public has no standing.

However in *Thorson v. A.-G. of Canada*⁵⁵ and *McNeil v. Nova Scotia Board of Censors*⁵⁶ it was held (at least with respect to declaratory as opposed to regulatory legislation) that the Attorney-General did not have the monopoly on actions to declare legislation unconstitutional, that is, the wider the scope of the legislation the more likely that the citizen will be granted standing to challenge its validity.

When this liberal attitude towards standing is taken in conjunction with the proposed constitutional environmental right it would seem probable that many more environmental issues would proceed to the courts.⁵⁷ It is suggested that the real problem is not the concept of an environmental right *per se* but rather the question of how to go about getting a constitutional environmental right once the need, or at least the advantage, of one is perceived. This leads us to the second question.

III. HOW BEST TO EFFECT THE ENTRENCHMENT OF AN ENVIRONMENTAL CONSTITUTIONAL RIGHT?

There are two possible alternatives:

- A. constitutional amendment by the appropriate legislative authority;
- B. by judicial creativity.

A. *Constitutional Amendment*

This process is traditionally more difficult than the amendment of ordinary legislation. Indeed this very fact contributes to the moral authority of any constitution. It cannot easily be tampered with by the legislature and is therefore relatively immune from political influence and partisan bias. The amendment processes are as diverse as constitutions are numerous. In the United States Article V provides that:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either case, shall be valid to all Intents and Purposes,

⁵⁴ See Roman, "Locus Standi: A Cure in Search of a Disease?" in Swaigen, *supra* note 8, at 11.

⁵⁵ [1975] 1 S.C.R. 138, 43 D.L.R. (3d) 1, 1 N.R. 225.

⁵⁶ [1976] 2 S.C.R. 265, 55 D.L.R. (3d) 632, 32 C.R.N.S. 376. See also *Min. of Justice v. Borowski*, [1982] 1 W.W.R. 97, 24 C.R. (3d) 352.

⁵⁷ Assuming standing to be a real obstacle — Roman, *supra* note 54, suggests that often the courts will look at the merits anyway if they can see any real basis for the case.

Note that the standing requirement under the enforcement section of the Charter (s. 24(1)) may be stricter than under these recent, but pre-1982, cases. Thus, s. 24(1) may not always be useful. However, judicial review is still possible under s. 52(1) of the *Constitution Act, 1982*. See below at pages and

as Part of this Constitution, when ratified by the Legislatures of three fourths thereof, as the one or other Mode of Ratification may be proposed by the Congress⁵⁸

In Canada, Part V of the *Constitution Act, 1982*⁵⁹ contains the procedure for amending the Constitution and in general cases⁶⁰ requires proclamation by the Governor General after resolution of the Senate,⁶¹ the House of Commons and the legislative assemblies of at least two-thirds of the provinces that have in aggregate at least fifty percent of the population of the country. It is clear, therefore, that constitutional amendment is the appropriate course where there is not only popular support for a particular provision but also political backing sufficient to carry the proposal.

Unfortunately for present purposes the existing political climate is particularly inclement. It is clear that, in Canada, Parliament considers language rights and the distribution of power between the Federal and Provincial governments to be more pressing than environmental issues concerning, *inter alia*, the right to life itself.

At the same time the public perception that a choice, rather than a balancing, is required between a clean environment and a materially affluent society also militates against adequate public backing for a constitutional amendment incorporating environmental rights.

It must be noted that neither CELA⁶² nor any other environmental or public interest group sought to influence the drafting of the Charter in order to entrench some form of a constitutional right to a clean environment. This is rather peculiar considering CELA's past contribution to questions of proposed constitutional reform. As early as 1972⁶³ CELA was calling for an "environmental bill of rights." However this policy, and indeed most other statements in Canada referring specifically to an "environmental bill of rights," have usually been made only in the context of demands for ordinary legislation aimed at environmental protection.⁶⁴ The use of ordinary legislation as the preferred approach to control pollution is also illustrated by the language of various bills introduced before the Ontario and Alberta legislatures with titles such as "The Environmental Bill of Rights" and the "Environmental Magna Carta Act."⁶⁵

In contrast to this is the response of CELA to Bill C-60⁶⁶ which would have amended the Constitution of Canada and which came before the Federal Parliament on June 20th, 1978. Bill C-60 was clearly the spiritual ancestor of

⁵⁸ *U.S. Const.* art. V.

⁵⁹ Sched. B of the *Canada Act 1982*, c. 11 (U.K.).

⁶⁰ See s. 38 of the *Constitution Act, 1982*.

⁶¹ Subject to s. 47 which gives the Senate what is, in effect, only a delaying power, not a veto.

⁶² Canadian Environmental Law Association.

⁶³ Special Meeting of CELA's national executive committee February 25, 1972. See (1972), 2 C.E.L.N. 37.

⁶⁴ *Supra* note 22, at 311 ff.

⁶⁵ See Swaigen and Woods, *supra* note 17, at nn. 23-25 and accompanying text.

⁶⁶ Bill C-60, 30th Parl., 3rd sess., 26-27 Eliz. II, 1977-78.

the *Constitution Act, 1982*⁶⁷ and certain of its provisions are markedly similar to those of the present Constitution. Bill C-60 would have recognised certain fundamental rights and freedoms including in section 6:

[T]he right of the individual to life, and to the liberty and security of his or her person and the right not to be deprived thereof except by due process of law.

In a brief⁶⁸ to the Joint Senate/House of Commons committee which considered the Bill, CELA recommended the addition to section 6 of "the right of the individual to environmental quality and environmentally sound planning" and also "the right of an individual to access to government information."⁶⁹

CELA also looked at section 4 which purported to state the aims of the Canadian federation, the first three of which might all be interpreted as recognizing the vital role of the environment and the need for the preservation and enhancement thereof.

CELA concentrated on the third aim which appears to have given express recognition to the concept of the public trust doctrine although concentrating mainly on the eradication of regional disparities:

[T]o pursue social justice and economic opportunity for all Canadians through the equitable sharing of the benefits and burdens of living in the vast land that is their common inheritance, through the commitment of all Canadians to the balanced development of the land of their common inheritance and to the preservation of its richness and beauty *in trust* for themselves and generations to come, and through their commitment to overcome unacceptable disparities among Canadians in every region including disparities in the basic public services available to them.⁷⁰

(Emphasis added.)

In its brief CELA recommended the modification of this aim to read:

through the commitment of all Canadians to the balanced *use* of the land of their common inheritance and to the preservation of its richness, beauty and *environmental quality* in trust for themselves and generations to come, through their commitment to overcome unacceptable disparities among Canadians in every region including disparities in the basic public services available to them *and through their commitment to environmental protection and sound environmental planning*.⁷¹

(Emphasis in original.)

CELA also recommended modifying section 96 which dealt directly with regional disparities. CELA wanted to introduce an additional section⁷² which would have established a general government policy of protecting environmental quality and in particular would have required environmental impact assessment, the prohibition of pollution havens resulting from disparity of provincial environmental legislation and the introduction of effective public participation. The aim of CELA's proposed amendments⁷³ was clearly to

⁶⁷ Sched. B of the *Canada Act 1982*, c. 11 (U.K.).

⁶⁸ Prepared by Toby Vigod and John Swaigen, September, 1979.

⁶⁹ CELA's brief at 12.

⁷⁰ See lines 13-27 of s.4 of the Charter (s. 4, Bill C-60, *supra* note 66).

⁷¹ CELA's brief at 12.

⁷² The proposed s. 96A in the brief.

⁷³ The first three in particular.

establish a substantive constitutional right to a clean environment. The constitution of any State reflects its fundamental values, priorities and commitments and it is suggested here that the constitution:

[S]hould not ignore the environment of Canada and the health of Canadians in its preoccupation with one issue: the political threat of separation of Quebec.⁷⁴

Although Bill C-60 was never enacted it is significant and unfortunate that the committee totally ignored CELA's representations. However, this fact does go some way to explain the absence of renewed efforts to entrench environmental rights in the Canadian Constitution when the Charter was drafted. It might be argued that perhaps some more positive efforts by environmental groups might have been expected in 1981 given the successful intervention of women's groups and supporters of native rights which resulted in the addition of section 35⁷⁵ (native rights clause) and section 28 (sexual equality clause) to the constitution.⁷⁶ However, this is to argue with hindsight and also to presuppose a public concern with environmental issues comparable to the questions of sexual equality and native rights which is perhaps unjustified given the present economic climate and the common perception noted above that environmental protection and economic development are mutually exclusive.

The problem of environmentalists here is analogous to the chicken and the egg conundrum. Is public awareness and demand a prerequisite to a constitutional environmental right or is it legitimate to aspire to such a right in order to promote public awareness and establish an environmental ethic?

It is suggested that the latter course is preferable. If the public were to be asked whether they supported the ideas of conservation, environmental protection and controlled resources management, undoubtedly the vast majority would readily give their assent. What is needed is a conduit through which to channel these latent aspirations into active public participation and involvement in environmental issues.

The problem is not so much one of lack of support as a failure to mobilize public environmental concern or, rather, a failure on the part of government to allow it to be mobilized. A constitutional right to a reasonably clean environment would be a particularly apt vehicle for the public's environmental goodwill as it would sharply focus public appreciation on the fact that environmental degradation is a matter of immediate concern directly affecting each and every Canadian, irrespective of wealth, religion, race or politics. However, it is clear that, for the time being at least, constitutional amendment is an unlikely mechanism by which to achieve recognition of such a right.

⁷⁴ CELA's brief at 8.

⁷⁵ Note that s. 35 is not in the Charter.

⁷⁶ Mains, *Some Environmental Aspects of a Canadian Constitution* (1980), 9 Alternatives 14 suggests that the greatest reason for just such a lack of involvement is a feeling that our efforts will be unsuccessful. However, environmentalists in particular must be careful not to lapse into such a negative frame of mind considering the value of what is at stake; even from a material point of view, as Aird and Love pointed out, *supra* note 12, "natural resources are the source of Canada's political, social and economic strength," *i.e.*, their use should be carefully planned.

B. *Judicial Creativity*

Although the avenue of incorporation of a constitutional environmental right by means of the amendment process would undoubtedly prove an extremely arduous one the enactment of the Charter may well have opened the door of judicial review as a means of establishing such a right. Canada has not as yet experienced an active process of judicial review⁷⁷ and in suggesting possible arguments for application of the Charter analogies will be drawn from the American and Irish experiences.

One should first note that American state constitutions are subject to different principles of interpretation than is the Federal Constitution. Thus the environmental protection provisions of American state constitutions are exhaustive of the rights contained therein⁷⁸ and may limit, therefore, the powers of the executive and legislature. Consequently, if a Constitutional right purports, or is interpreted as purporting, to be exhaustive of the citizen's environmental rights it may unduly restrict the competence of the legislature to enact environmental protection laws. For example, if the Constitution protects against noise, air and water pollution but makes no reference to soil pollution the legislature may well be incompetent to prohibit the latter type of pollution. However, this is a specific American problem and not applicable in Canada where different principles of constitutional interpretation operate.

That the Canadian constitution should be liberally construed so as to carry into effect the intentions of the people is supported by analogy to the Constitution of Bermuda as interpreted by the Privy Council in *Minister of Home Affairs v. Fisher*.⁷⁹ Lord Wilberforce noted first the broad and ample style of the drafting which laid down principles of width and generality and then stated that this (in conjunction with the European Convention for the Protection of Human Rights and Fundamental Freedoms and the United Nations Universal Declaration of Human Rights, 1948) called:

[F]or a generous interpretation avoiding what has been called "the austerity of tabulated legalism," suitable to give to individuals [their] full measure of fundamental rights and freedoms . . .⁸⁰

The Privy Council has further stated, with specific reference to Canada and the *British North America Act, 1867*⁸¹ (now the *Constitution Act, 1867*), that:

in interpreting a constituent or organic statute such as the Act, that construction most beneficial to the widest possible amplitude of its powers must be adopted.⁸²

⁷⁷ Although some old dicta suggested the existence of an "implied bill of rights" — see Hogg, *Constitutional Law of Canada* (Toronto: Carswell Co., 1977) at 429-30. Note also the limited foray into this field by the Supreme Court of Canada in *R. v. Drybones*, [1970] S.C.R. 282, 9 D.L.R. (3d) 473, [1970] 3 C.C.C. 355.

⁷⁸ C.f. the provisions of the Federal Constitution which are enabling rather than limiting.

⁷⁹ [1980] A.C. 319, [1979] 3 All E.R. 21, [1979] 2 W.L.R. 889.

⁸⁰ *Id.* at 328 (A.C.), 25 (All. E.R.), 894 (W.L.R.).

⁸¹ C. 3, 30 Vict. (U.K.).

⁸² *British Coal Corp. v. The King*, [1935] A.C. 500 at 518, [1935] All E.R. 139 at 145, 51 T.L.R. 508 at 511, *per* Viscount Sankey.

In Ireland the Constitution was adopted by a plebiscite in 1937.⁸³ The initial experience was one of "judicial business as usual" as the positivist tradition established under British rule and perpetuated in the Free State era⁸⁴ was applied to the new rigidly written Constitution. Such was the existing mentality in 1937. It is extremely unlikely that the framers of the Constitution would have ever contemplated judicial review of the kind exercised today.⁸⁵ Thus, while Articles 40 to 44 set out a series of provisions entitled "Fundamental Rights", the Dail⁸⁶ debates for the 3rd June, 1937, indicate that deValera (Prime Minister and prime mover behind the 1937 Constitution) intended them only as "headlines for the legislature," not as fertile ground for judicial review.⁸⁷

The original positivist position was clearly expressed by Fitzgibbon J. with respect to the 1922 Constitution⁸⁸ when he gave the majority opinion in *State (Ryan) v. Lennon*:⁸⁹

When a written Constitution declares that "the liberty of the person is inviolable," but goes on to provide that "no person shall be deprived of his liberty *except in accordance with the law*," then, if a law is passed that a citizen may be imprisoned indefinitely upon a *lettre de cachet* signed by a Minister or, . . . even by a Minister's clerk . . . the citizen *may* be deprived of his "inviolable" liberty, but, as the deprivation will have been "in accordance with law," he will be as devoid of redress as he would have been under the regime of a French or Neapolitan Bourbon . . . The framers of our Constitution may have intended "to bind man down from mischief by the chains of the Constitution,"⁹⁰ but if they did,⁹¹ they defeated their object by handing him the key of the padlock in Article 50.⁹²

⁸³ This route was chosen rather than enactment by the Oireachtas (the Irish equivalent of the Queen in Parliament) in order to ensure an autochthonous root of title and to circumvent legal arguments as to whether Westminster or Dublin was the competent assembly to legitimate the Constitution.

⁸⁴ 1922-1937.

⁸⁵ The Irish courts today exercise what effectively amounts to substantive due process based primarily on Art. 40.3. See generally Kelly, *The Irish Constitution*. (Dublin: Jurist Publishing Co., 1980) [hereinafter referred to as Kelly].

⁸⁶ Lower houses of Parliament in the Irish Free State.

⁸⁷ *Id.* at 328, n. 2. It is interesting to compare de Valera's comments with the sentiments expressed by Dr. B.L. Strayer, Assistant Deputy Minister, Public Law, of the Federal Department of Justice when giving the view of the drafters with respect to s. 7 of the Charter:

Mr. Chairman, it was our belief that the words "fundamental justice" would cover the same thing as what is called procedural due process, that is the meaning of due process in relation to requiring fair procedure. However, it in our view does not cover the concept of what is called substantive due process, which would impose substantive requirements as to the policy of the law in question . . . [In the United States] the term due process has been given the broader concept of meaning both the procedure and substance. Natural justice or fundamental justice in our view does not go beyond the procedural requirements of fairness.

Quoted by Hogg, *Canada Act 1982 Annotated*. (Toronto: Carswell Co., 1982) at 29.

⁸⁸ Which provided the framework for the 1937 Constitution — see preface to Kelly, *supra* note 85.

⁸⁹ [1935] I.R. 170, 69 I.L.T.R. 125 (S.C.).

⁹⁰ A quote from Thomas Jefferson.

⁹¹ It has just been suggested that they, and de Valera in particular, did not.

⁹² *Supra* note 89, at 231 (I.R.), 148 (I.L.T.R.). Art. 50 provided the amendment process; *c.f.* s. 33 of the Charter.

This view was repeated periodically during the next few years⁹³ although with certain deviations such as that adopted by Sullivan C.J. who at one point sought to back off from this extreme positivist position in *State (Burke) v. Lennon*:⁹⁴

Certain constitutional principles are stated in the Constitution, but many other important constitutional principles have been adopted as existing in the law in force.⁹⁵

While this idea of the State having two constitutions, one written and the other unwritten, was subsequently rejected,⁹⁶ the concept of judicial review has since blossomed. Initially this was due mainly to the efforts of Gavan Duffy J. who in the first fifteen years after enactment of the 1937 Constitution sought vigorously to develop just such a constitutional jurisprudence. Since then subsequent developments have been due to the efforts of the entire Bench in what has proved to be an extremely activist judiciary. Indeed the developments have been such as to cause the Taoiseach⁹⁷ to tell the Dail in 1980:

[I]t would be a brave man who would predict these days what was or was not contrary to the Constitution.⁹⁸

The contrast to the earlier positivist approach to constitutional interpretation is striking. In rejecting the earlier position Gavan Duffy J. said as long ago as 1939:⁹⁹

The opinion of Fitzgibbon J. in *Ryan's* case . . . does not apply, in my judgment, to a Constitution in which fundamental rights and constitutional guarantees effectively fill the lacunae disclosed in the polity of 1922.¹⁰⁰ The Constitution, with its most impressive Preamble, is the Charter of the Irish People, and I will not whittle it away.

But the modern Irish judiciary has gone even further and, as Professor Kelly points out, a strong natural law bias is now apparent on the Bench.¹⁰¹

In what American terminology would describe as "substantive due process" the judiciary has, since 1965,¹⁰² "found" unspecified personal rights in Article 40.3¹⁰³ of the 1937 Constitution. These can be said to result from the "Christian and democratic" nature of the State. The theory of supremacy of

⁹³ E.g., by Sullivan C.J. in *In re Art. 26 of the Constitution and the Offences Against the State (Amendment) Bill, 1940*, [1940] I.R. 470, 74 I.L.T.R. 61 (S.C.) and *In re Art. 26 of the Constitution and the School Attendance Bill, 1942*, [1943] I.R. 334, 77 I.L.T.R. 96 (S.C.), and by Dixon J. in *Foley v. The Irish Land Commission*, [1952] I.R. 118, 86 I.L.T.R. 44 (S.C.).

⁹⁴ [1940] I.R. 136 (S.C.).

⁹⁵ Quare whether this argument is tenable in Canada given the wording of s. 52(2), "The Constitution of Canada includes . . ." Professor Hogg suggests not.

⁹⁶ *State (Walsh) v. Lennon*, [1942] I.R. 112, 76 I.L.T.R. 207 (S.C.).

⁹⁷ Prime Minister.

⁹⁸ Quoted in the preface to Kelly, *supra* note 85.

⁹⁹ *Supra* note 94.

¹⁰⁰ The 1922 Constitution during its period in force was at all times amendable by ordinary legislation.

¹⁰¹ Kelly, *supra* note 85, at 334.

¹⁰² *Ryan v. A.-G.*, [1965] I.R. 294 at 310, 319 (S.C.).

¹⁰³ The Irish equivalent of the United States Ninth Amendment.

natural law principles was most strongly emphasised by Walsh J. of the Supreme Court in *McGee v. A.-G.*:

Articles 41, 42 and 43 emphatically reject the theory that there are no rights without laws, no rights contrary to the law and no rights anterior to the law. They indicate that justice is placed above the law and acknowledge that natural rights, or human rights, are not created by law but that the Constitution confirms their existence and gives them protection In this country it falls finally upon the judges to interpret the Constitution and in doing so to determine, where necessary, the rights which are superior or antecedent to positive law. . . .¹⁰⁴

The above illustrates the development of a radically different constitutional jurisprudence after the introduction of a new constitution in a jurisdiction formerly reliant on positivist notions of parliamentary supremacy. This is not necessarily to suggest that Canadian courts should follow the path beaten by the Irish courts (although certain comparative arguments will be developed later), rather it is to buttress the optimism of the following arguments based on a requirement of active judicial review. It is suggested, therefore, that it is open to Canadian courts to imply a constitutional environmental right of some description on the basis of the Charter. To this end the foregoing argument has suggested that active judicial review of the Charter is a legitimate and feasible aspiration. Early Charter cases in the lower courts have suggested a willingness on the part of the judiciary to play such a role.¹⁰⁵

As Professor Hogg points out¹⁰⁶ section 52(1) of the *Constitution Act, 1982*¹⁰⁷ provides the basis for judicial review in Canada. It ensures the supremacy of the Constitution of Canada over other legislation with the result that any inconsistent law is nullified and rendered invalid. In addition, section 24(1) provides an independent remedy to ensure the enforcement of the rights and freedoms guaranteed by the Charter. It is, however, more restrictive than section 52(1) as it requires rights to have been "infringed or denied" before an application can be made to the appropriate court. The section, therefore, would appear not to apply to a prospective denial of rights, and the wording also suggests that it must be the applicant's rights that are denied. In other words, a representative could not bring an action under section 24(1) on behalf of a person whose rights had been infringed nor, for that matter, in order to vindicate citizens' rights generally. This would prevent a group such as CELA bringing an action under section 24(1) to declare as unconstitutional legislation which violates the proposed constitutional environmental right.

However, CELA could have recourse to section 52(1) which is applicable to the entire Constitution of Canada and by implication also to the Charter.¹⁰⁸

¹⁰⁴ [1974] I.R. 284 at 310.

¹⁰⁵ *E.g., Re Potma and the Queen* (1982), 37 O.R. (2d) 189, 67 C.C.C. (2d), 15 M.V.R. 80 (H.C.), aff'd (1983), 18 M.V.R. 133 — *per* Eberle J., Charter not to be interpreted too narrowly. *Southam Inc. v. Hunter*, [1982] 4 W.W.R. 673, 20 Alta. L.R. (2d) 144 (Alta. Q.B.) — *per* Cavanagh J., broad and liberal interpretation to be given to the Charter.

R. v. Minardi C.L.I.C. Charter of Rights Service 29/9/82 Ont. Co. Ct. Graburn J., s. 8 *Narcotics Control Act* struck down as being contrary to s. 11 (d) of the Charter and incapable of being demonstrably justified in accordance with s. 1.

¹⁰⁶ Hogg, *supra* note 87, at 105.

¹⁰⁷ Sched. B. of the *Canada Act 1982*, c. 11 (U.K.).

¹⁰⁸ Hogg, *supra* note 87, at 66.

Judicial review, therefore, has a clear constitutional basis. It is suggested that the real problem is the constitutional right to a clean environment itself and in establishing this as a recognized constitutional right as it is not expressly included in the Charter.¹⁰⁹

Neither, however, is an express constitutional environmental right to be found in the United States *Bill of Rights*.¹¹⁰ However, the incorporation of just such a right has been widely canvassed both in academic papers¹¹¹ and in the courts.¹¹² Such arguments have been based on:

- (1) the fifth amendment
- (2) the ninth amendment
- (3) the fourteenth amendment, and
- (4) the Constitution in its entirety.

The right which is habitually claimed is the right to a (reasonably) clean environment.

The main argument is that the due process clauses of the fifth and fourteenth amendments, which guarantee the rights to life and liberty at both federal and state levels (the latter by incorporation through the fourteenth amendment) necessarily also guarantee a right to a reasonably clean environment.

Another possible source of the right to a clean environment is the ninth amendment which provides that:

[T]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

There are two possible interpretations of this amendment. On the one hand it can be seen as authorizing the development by the judiciary of unspecified rights which need not necessarily be connected with other express constitutional provisions. On the other hand, it can be seen as only permitting the judiciary to recognize rights implicit in other constitutional provisions, that is, this "penumbra" theory would have us believe such rights have always been inherent in the Constitution.

¹⁰⁹ The only sections expressly dealing with environmental concerns are directed primarily to the distribution of powers. Thus, ss. 50 and 51 of the Constitution Act which come under the heading of "natural resources" add a new section, s. 92A, to the *Constitution Act, 1867*. The purpose is to ensure the exclusive jurisdiction of the provinces over three classes of subjects listed — (b) and (c) of which include the *conservation* of non-renewable natural resources, forestry resources and electrical energy facilities.

¹¹⁰ *U.S. Const. amend. I-X*.

¹¹¹ Kirchick, *The Continuing Search for a Constitutionally Protected Environment* (1975), 4 *Env. Aff.* 515; Roberts, "The Right to a Decent Environment" in Baldwin and Page eds., *Law and the Environment* (N.Y.: Walker & Co., 1970) 134; Roberts, *The Right to a Decent Environment; E = MC²: Environment Equals Man Times Courts Redoubling Their Efforts* (1970), 55 *Cornell L. Rev.* 674; Hanks et al., "The Right to a Habitable Environment" in Dorsen ed., *The Rights of Americans* (New York: Random House, 1971) at 153.

¹¹² See the periodical literature generally and in particular Kirchick, *id.* at 516.

The first theory was espoused by Justice Goldberg in *Griswold v. Connecticut*¹¹³ and it suggests that it is a legitimate exercise of the judicial function for the courts to recognize the constitutional right to a clean environment as being protected by the ninth amendment if it can be categorized as a fundamental right retained by the people.

The "penumbra" theory favoured by the majority in *Griswold*, proposes that a constitutional right to a clean environment would only be recognized if it could be found to be implicit in other express Constitutional provisions. These arguments will later be applied by analogy to the Canadian Charter.

Finally, the argument that one can establish a constitutional right to a clean environment on the basis of the Constitution in its entirety would appear to be little more than an unspecific extrapolation of the penumbra theory and will not be further discussed.¹¹⁴

Other arguments do, however, sound compelling on first hearing. How have they fared in the courts? The honest answer must be an admission of total failure.

The attempt to have the constitutional right to a clean environment recognized was taken in hand in the early 1970s and reflected the surge in public awareness of the problems facing the environment at that time. The initial judicial reaction was one of caution, as it usually is in the face of novel claims, especially when they involve the fundamental law of the State.

In *Ely v. Velde*¹¹⁵ the court noted that:

While a growing number of commentators argue in support of constitutional protection for the environment, this newly advanced constitutional doctrine has not yet been accorded judicial sanction; and the appellants do not present a convincing case for doing so.

The above decision was developed somewhat further in *Environmental Defense Fund v. Corps. of Engineers*:¹¹⁶

The Court is not insensitive to the positions asserted by the plaintiffs . . . Those who would attempt to protect the environment through the courts are striving mightily to carve out a mandate from the existing provisions of our Constitution. Others have proposed amendments to our Constitution for this purpose. Such claims even under our present Constitution, are not fanciful and may, indeed, some day, in one way or another, obtain judicial recognition. But as stated by Judge Learned Hand in *Spector Motor Serv. Inc. v. Walsh*, 139 F. 2d 809 (2 Cir., 1944): "Nor is it desirable for a lower court to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant" But the Court concludes that the plaintiffs have not stated facts which would under the present state of the law constitute a violation of their constitutional rights The Court's decision on this point gives further emphasis to its statement, *supra*, that final decisions in matters of this type must rest with the legislative and executive branches of government.¹¹⁷

(Emphasis added.)

¹¹³ *Supra* note 48.

¹¹⁴ It was summarily dismissed by Noel J. in *Tanner v. Armco Steel Corp.* 340 F. Supp. 532 (S.D. Texas 1972) [hereinafter cited as *Tanner*].

¹¹⁵ 451 F. 2d 1130 at 1139 (4th Cir. 1971).

¹¹⁶ 325 F. Supp. 728 at 738 (U.S.D. Ct. Ark. 1971).

¹¹⁷ *C.f.* the decision of Noel J. in *Tanner* discussed *infra*.

Judge Noel in the federal District Court, however, was obviously unhappy with the pregnancy and he performed what can only be described as an abortion on the fetal constitutional right to a clean environment in the landmark¹¹⁸ environmental constitutional case of *Tanner v. Armco Steel*. The main point in issue was the existence of State action, that is, whether or not the State could be said to be responsible for companies' activities. Judge Noel succinctly pointed out that the Fifth Amendment applies only as a restraint upon the Federal government and upon states through the Fourteenth Amendment; not against private individuals. Nonetheless, forbearing the plea for judicial restraint made by the court in *E.D.F. v. Corps. of Engineers*,¹¹⁹ he assumed state action for the sake of argument and proceeded to deny the existence of any relevant federal constitutional right capable of application through incorporation via the Fourteenth Amendment. His reasons were:

First, there is not a scintilla of persuasive content in the words, origin, or historical setting of the Fourteenth Amendment to support the assertion that environmental rights were to be accorded its protection. To perceive such content in the Amendment would be to turn somersaults with history.¹²⁰

In support of this contention he cited the observations of Representative Richard L. Ottinger who as sponsor of a federal environmental amendment stated in Congress:

We are frank to say that such a provision to the Constitution would have been meaningless to those attending the Constitutional Convention in Philadelphia almost two hundred years ago.¹²¹

However, there are two important points to note here. First, simply because such a constitutional right may not have been foreseen by the Founding Fathers does not necessarily imply that such a right may not be legitimately taken as inherent in the Constitution today. A constitution cannot be regarded as a static document forever fixed in the ethos of 1791. If a constitution is truly to reflect the fundamental values of society it must prove to be dynamic and capable of adjustment in accordance with societal developments. The amendment process alone is not enough to ensure that a constitution is a living document truly representative of the ideals and aspirations of a nation.

This was appreciated by Justice Frankfurter in *Wolf v. Colorado*¹²² when he observed:

It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights.

Secondly, even if the Canadian Constitution was deemed to have crystallized in the first year of its enactment this is clearly no obstacle to the implication of a constitutional environmental right considering the widespread public awareness of the environmental problem in 1982.¹²³

¹¹⁸ Perhaps tombstone might be the more appropriate word.

¹¹⁹ *Supra* note 116.

¹²⁰ *Supra* note 114, at 536.

¹²¹ Quoted in Platt, *Toward Constitutional Recognition of the Environment* (1970), 56 Am. B. Assoc. J. 1061 at 1062.

¹²² 338 U.S. 25 at 27 (1949).

¹²³ Although it might be difficult to rely on provisions of *The Constitution Act, 1867*.

Judge Noel's second reason was that:

[N]ow here in the Fourteenth Amendment — or its “incorporated” amendments — can be found the decisional standards to guide a court in determining whether the plaintiffs’ hypothetical environmental rights have been infringed, and, if so, what remedies are to be fashioned.¹²⁴

He also suggested that statutory standards were necessary to guide the court. As noted this argument has been advanced by Swaigen and Woods¹²⁵ but environmental legislation itself has not yet proved comprehensive or demanding enough while the enforcement of present environmental legislation has also proved defective. There is a danger of placing too much faith in the legislature or in the courts. It has been suggested above that in the United States the courts have played a positive and beneficial role in developing societal values in other much more political areas.¹²⁶ The judiciary should play an equal role in re-orienting society here: replacing relentless material consumption and the demand for ever increasing material wealth with an appreciation of the necessity of propagating a “quality”¹²⁷ environment and an awareness that the environment can no longer look after itself. It is suggested that the courts do in fact possess the qualities for resolving environmental disputes and as Kirchick argues:

[T]he current lack of judicial standards is no reason for declining to enunciate a doctrine of environmental rights. Admittedly, the dimensions of a right to a reasonably non-hazardous environment will be imprecise at first. But it is fair to anticipate that on the basis of case-by-case experience, content and meaning will be given to that right so that a fair degree of certainty as to its implications will develop over time. . . . In the end, the evolution of precedent will supply the necessary content through the application of the same principles of equity which have enabled the courts in the past to fashion remedies for newly-recognized rights.¹²⁸

Clearly this argument may be made just as forcibly in Canada where, in particular, section 24(1) of the *Constitution Act, 1982*¹²⁹ allows the court *carte blanche* with respect to remedies when rights under the Charter are denied. *Ubi jus, ibi remedium*.

Judge Noel's third objection to a constitutional environmental right was that:

[F]rom an institutional viewpoint, the judicial process, through constitutional litigation, is peculiarly ill suited to solving problems of environmental control. Because such problems frequently call for the delicate balancing of competing social interests, as well as the application of specialised expertise, it would appear that their resolution is best consigned initially to the legislative and administrative processes.¹³⁰

It is not proposed to disagree with this assessment that administrative and legislative processes are the most appropriate forums in which to deal with the bulk of environmental issues. However, this is surely not to deny the citizen his

¹²⁴ *Tanner*, *supra* note 114, at 536.

¹²⁵ See text accompanying note 17, *supra*.

¹²⁶ See text accompanying notes 36-38, *supra*.

¹²⁷ The concept of quality versus quantity is discussed further by Roberts in *Law and the Environment*, *supra* note 110, at 148, 165.

¹²⁸ Kirchick, *supra* note 111, at 538.

¹²⁹ Sched. B of the *Canada Act 1982*, c. 11 (U.K.).

¹³⁰ *Supra* note 114, at 536.

fundamental rights (which are not professed to be absolute) nor the courts their jurisdiction as protectors of freedom and vindicators of rights.¹³¹ It is not for the courts to exercise legislative or administrative functions¹³² but it is open to them, and indeed, it is their duty to be vigilant in their review of other powers of State in order to ensure respect for the personal rights of the citizen.

It may well be true that the court should only interfere with environmental decisions in rare cases, but to deny them this jurisdiction altogether would surely amount to a usurpation of the judicial process.¹³³

Judge Noel's final objection was that there are already appropriate remedies for environmental matters, namely the common law remedies and, in particular, nuisance; he feared "the wholesale transformation of state tort suits into federal cases."¹³⁴

The latter point can be seen as his main objection for, while common law remedies are theoretically available, the circumstances in which they are appropriate or produce an environmentally sound decision are so restricted as to greatly limit their application.¹³⁵

However, the transformation of state tort suits into federal cases is an important issue in Canada as well as in the United States given the great concern with questions concerning the distribution of powers. One argument is that it would be better to ensure federal jurisdiction in these matters because of the pervasive nature of pollution and its lack of respect for political boundaries. Federal jurisdiction would better prevent the creation of pollution havens, for example, where one province enacts more lax standards in order to entice industry. At the same time, however, problems also arise where the province or state wishes to enact stricter environmental controls than the existing federal ones:

Because of the existence of concurrent powers in some areas and the lack of clarity as to which level of government has jurisdiction in other areas, jurisdictional buck passing has become a fact of life in environmental matters in Canada.¹³⁶

However, these arguments do not deny the validity of a constitutional right to a clean environment. They form the basis for an argument for amendment of the Constitutional distribution of power provisions in order to provide

¹³¹ *C.f.* Morley ed., *Ask The People* (Winnipeg: Agassiz Centre for Water Studies, 1972) at 102 — can we afford to exclude the judicial process from one of the most important issues of our time?

¹³² But *c.f.* Sax who believes that the courts should impose environmental standards and indeed provided for this when he drafted MEPA and see also Thompson and Fraser, "The Last Bottle of Chianti and a Soft Boiled Egg" in Holman and Morley, eds., *Ask The People* (Winnipeg: Agassiz Centre for Water Studies, 1971) at 17, 18 who there suggested that the courts were an appropriate forum in which to develop pollution standards because (1) they were immune from political pressure (2) they had a highly organized system of fact finding and (3) they could be overruled by legislation if they were wrong.

¹³³ Indeed Noel J. himself hints at judicial intervention by his use of the word "initially."

¹³⁴ *Supra* note 114, at 537.

¹³⁵ See McLaren, *The Common Law Nuisance Actions and the Environmental Battle — Well-Tempered Swords or Broken Reeds?* (1972), 10 Osgoode Hall L.J. 505.

¹³⁶ *Supra* note 68 — CELA's 1978 Brief at 6.

a greater measure of certainty — perhaps along the lines suggested by CELA in 1978.¹³⁷ This amendment is itself very pressing especially when one has regard to the findings of Wenner¹³⁸ that the prominence given to questions of distribution of powers by many members of the United States Supreme Court has been far greater than that accorded to the environment.

In short it is suggested that the reasons for not recognizing the constitutional environmental right given by Judge Noel are untenable and, notwithstanding the decision in *Tanner*, a constitutional environmental right is still a legitimate aspiration.

IV. WHAT FORM SHOULD THE CONSTITUTIONAL ENVIRONMENTAL RIGHT TAKE AND WHERE WILL IT COME FROM?

A number of the Charter's provisions should be considered, the principal one being section 7:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with principles of fundamental justice.

If section 7 purports to protect rights to life, liberty and security of person, surely this must also be taken to include a right to a clean environment. Without such an environment life itself cannot be supported or at best may be prohibited (and our liberty consequently reduced) from certain areas, for example, entering industrial zones where the environment is so polluted as to be toxic and dangerous to health.

As has been argued in the United States with respect to the fifth and fourteenth amendments, it seems clear that in section 6 "the concept of liberty embraces freedom from a contaminated environment."¹³⁹ On the other hand, the contrary argument would have it that section 7 is merely a shibboleth and serves only as a generalization of the more specific guarantees of sections 8 to 14. This point need not be argued here for it has been adequately dealt with by McDonald who concludes:

[I]t is doubtful that it is sound to regard sections 8 to 14 as emanations or illustrations of section 7. In other words it is possible that the rights guaranteed by sections 8 to 14 should be regarded as independent of section 7 and, correspondingly, not to be regarded as limitative of the scope of section 7.¹⁴⁰

Recognizing that section 7 should be accorded a wide interpretation, the question remains as to whether a right to a reasonably clean environment is likely to arise in the light of the American experience. It has been suggested that the arguments proffered by Judge Noel in *Tanner* were untenable. The

¹³⁷ *Id.* at 13; the proposed s. 96A. See also the proposals of Mains, *supra* note 76, and his observation that, "the confusions, intransigence, mismanagement, secrecy, influence peddling, and in many instances corruption that characterise resource management across Canada today could fill volumes and indeed many of these have been written. Not many of us are happy with the division of power or the forms of public recourse that currently exist in the field of resource management."

¹³⁸ Wenner, *The Environmental Decade in Court* (Bloomington: Indiana Univ. Press, 1982) at 145.

¹³⁹ Kirchick, *supra* note 111, at 525.

¹⁴⁰ McDonald, *Legal Rights under the Canadian Charter of Rights and Freedoms* (Toronto: Carswell Co., 1982) at 20.

reality is that a number of other factors conspired to produce that particular decision, one being the weakness of the environmental ethic. Thus, even though *Tanner* was decided at the peak of public environmental concern the issues had not then been delineated accurately enough to establish a high profile in the judicial value system. Although there was widespread public appreciation of the need to protect the environment, there was not yet sufficient experience with specific issues and proposed solutions such as N.E.P.A.,¹⁴¹ the *Clean Air Act*¹⁴² and environmental protection acts generally for this newly perceived value to have filtered through to the Bench.

It may well be that the judiciary today has not progressed much further along the road towards recognizing environmental values¹⁴³ as being commensurate with or even more important than traditional property rights, but it is suggested that we have gone some way in that direction and in an appropriate case, where, for instance, legislation was clearly oppressive, and there was no reasonable relationship between the benefit conferred on the citizen and the interference with the personal rights of that citizen,¹⁴⁴ an activist judiciary might well approve such a constitutional right.

In conjunction with the above, one must consider the traditional reaction of what is generally an extremely conservative judiciary, especially when faced with issues concerning collectivist concepts, such as the public's right to a clean environment. The reluctance of the courts to restrict individual property rights or to hinder the executive or legislature in the exercise of their powers when the opposing value is a collectivist one is exemplified by the restrictive application of the public trust doctrine both in the United States and, more particularly, in Canada. The doctrine provides that the government holds public lands in trust for citizens generally and, on this basis therefore an individual can challenge government decisions which purport to use the land in a manner contrary to the public interest, for example, granting a lease permitting the excavation of sand from a Provincial Park.

In the United States, even where the public trust doctrine has been embodied in State Constitutions, the concept has, to a large extent, been emasculated despite appearing to be a useful legal device for environmental protection.¹⁴⁵ The problem as Professor Hunt observes, and quoting Professor Sax to the same effect, is that:

[T]here is no well conceived doctrinal basis that supports a theory under which some interests are entitled to special judicial attention and protection other than the dubious notion that the general public should be viewed as a property holder.¹⁴⁶

A similar problem is raised by the idea of a constitutional right to a clean environment. While such a right is not definitively a collectivist property right neither is it inherently an individual personal right. And while it does possess

¹⁴¹ *National Environmental Protection Act*, 42 USCA 42, 4332.

¹⁴² 42 U.S.C. §1857.

¹⁴³ This is partly illustrated by the greater concern demonstrated by the U.S.S.C. towards Federal/State jurisdictional questions than towards the environment — *supra* note 138.

¹⁴⁴ This text is taken from Kenny J.'s judgment in the High Court in *Ryan v. A.-G.*, [1965] I.R. 294 and its use will be urged again. See page below.

¹⁴⁵ Hunt, "The Public Trust Doctrine in Canada" in Swaigen, *supra* note 8, at 151.

¹⁴⁶ *Id.* at 155.

something of a hybrid character it would seem that the concept is treated generally as being a public rather than a private right. This, it is suggested, helps explain the reluctance of the courts to sanction the existence of this right; it merely reflects the judiciary's hesitancy and inexperience with respect to such matters rather than some flaw in the legal reasoning which supports the right.

It is further suggested that this problem of opposition to collective concepts can be circumvented by a certain compromise of principle. While it is conceded that a constitutional right to a clean environment may be unlikely to arise in the near future, the environment is still entitled to constitutional protection insofar as this may be achieved by the individual citizen asserting his personal right to bodily integrity or, in the alternative, his personal right not to have his health jeopardized. Such concepts are more familiar to the judiciary.

The appeal of these personal rights from the point of view of the environmentalist is that although they do not protect the environment *per se* they not only give the court an acceptable counterbalance to set against traditional property rights and executive authority, but they also effectively counter the argument, heard most frequently in the United States, that the court is not entitled to protect economic and social liberties. The fear that the court would return to the position in *Lochner v. New York*¹⁴⁷ and the pre-New Deal era is still prevalent.

This latter argument presupposes environmental concerns as being essentially economic while the proposed rights to health and bodily integrity are manifestly personal rights of the kind traditionally accepted as a proper subject of judicial review.¹⁴⁸

A. *Are Rights to Health and Bodily Integrity Inherent in the Charter?*

If one accepted the earlier argument that section 7 of the Charter embodies a right to a clean environment *a fortiori* it entrenches the more specifically *ejusdem generis* rights to health and bodily integrity. It seems clear, however, that while section 7 may legitimately be given a broad interpretation¹⁴⁹ its ambit was not meant to incorporate what the Americans would call "substantive due process." The rights protected are expressly made subject to the "principles of fundamental justice."¹⁵⁰

Hogg suggests that the courts could probably:

[R]eview the appropriateness and fairness of the procedures enacted for a deprivation of life, liberty and security of the person — but that is all. The courts could not review the substantive justification for the deprivation. . . .¹⁵¹

¹⁴⁷ *Supra* note 47.

¹⁴⁸ This is not to suggest that the courts can never review economic questions — see text accompanying note 144, *supra* for a suitable test.

A third reason for the decision in *Tanner* is a more practical one but should be mentioned if only because it is commonly found in environmental litigation. The plaintiffs were a group of concerned citizens represented by only one attorney (undoubtedly due to financial constraints). The defendants, on the other hand, who included among their ranks the Shell Oil Company, were represented by nine attorneys all presumably of the highest quality money can buy.

¹⁴⁹ See text accompanying notes 79 and 80, *supra*.

¹⁵⁰ As well as to limits imposed in accordance with s. 1.

¹⁵¹ Hogg, *supra* note 87, at 27.

He then goes on:

Of course, matters of procedure shade into matters of substance. For example, is it a question of substance or simply fair procedure whether a medical treatment (such as a blood transfusion) can be administered without the consent of the patient?¹⁵²

Similarly with environmental matters, is it a question of substance or simply procedure whether a factory is to be permitted to emit toxic pollutants which are detrimental to the health of local citizens, or whether municipalities are to be authorized to mix potentially hazardous chemicals into the public water supply?¹⁵³

For the immediate future at least, having regard to the previous judicial attitude towards the Canadian *Bill of Rights*,¹⁵⁴ it seems likely that the best that can be expected of section 7 is the enforcement by the courts of procedural safeguards. This is not supportive of the concept of a substantive constitutional right to environmental protection which is here being urged, but its value to the environmentalist should not be underestimated.

When Canadian environmentalists have called for an environmental bill of rights, they have usually envisaged a comprehensive system of legislative reform incorporating such ideas as:

- a) the right to participate in government decision making
- b) the right to use the courts and administrative tribunals to compel government and industry to respect the environment (standing)
- c) the right of access to government information and,
- d) a mandatory environmental impact assessment requirement.

Insofar as public participation in environmental matters is the objective, the Charter could go a long way towards ensuring implementation of more efficient and responsive decision making. Legislation therefore, might be struck down where there has been inadequate public debate, or regulations might be remitted for reconsideration where all the material factors have not been taken into account or accorded due weight.

Environmentally unsound development might be halted where E.I.A. has not been carried out even though the particular undertaking has been exempted by Ministerial order in a situation where the exemption has not been given adequate publicity and there has been no real opportunity for citizen

¹⁵² *Id.*

¹⁵³ *E.g.*, fluoridation.

¹⁵⁴ Part I, section 1(a) was never pleaded in an environmental case although the possibility was sometimes suggested — see Landstreet, "Last Bottle of Chianti", *supra* note 112, at 47 and Clark and Mclean, eds., *Environmental Civil Liberties* (Environmental Civil Liberties Research Group, 1972) at vi.

Since *R. v. Drybones*, *supra* note 77, the S.C.C. has bowed once again to parliamentary supremacy. However, see *Curr v. The Queen*, [1972] S.C.R. 889, 26 D.L.R. (3d) 603, 7 C.C.C. (2d) 181 where the question was whether the words "due process of law" in s. 1(a) could authorize the courts to indulge in substantive due process. Laskin C.J. giving the majority decision assumed that this was a legitimate function of the court but stated that the court would require compelling reasons before it acted in this fashion. It must be noted that the court stressed that the *Bill of Rights* was ordinary legislation and did not possess constitutional authority.

A fortiori where the court is analysing a constitutional document it may all the more readily intervene constructively.

response. Indeed, an active judiciary might well require public access to government information before a requirement of public participation can be said to have been properly fulfilled.

Furthermore, the provisions of section 1 of the Charter place the burden of proof on the government to establish that any restrictions are reasonable and can be demonstrably justified in a free and democratic society. Seen in this light the Charter could well be an environmentalist's dream come true.¹⁵⁵

While appreciating that such a procedural right may be the best we can hope for in the immediate future and that even it would require a radical departure from the judiciary's traditional positivism, an argument should be made for the substantive rights to health and bodily integrity which have already been proposed.¹⁵⁶ If the argument is never made the courts can hardly be expected to consider it. The development of judicial review in Ireland demonstrates that with the introduction of a new constitutional regime active judicial review is a real possibility even in the face of a strong positivist tradition.

The basic argument is that rights to health and bodily integrity¹⁵⁷ are inherent in section 7 of the Charter when this is read in conjunction with section 26:

The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.

Section 26 is the counterpart of the United States Constitution's ninth amendment which was discussed earlier¹⁵⁸ and has been given two possible interpretations. Justice Goldberg's concurring opinion in *Griswold* would permit the Supreme Court to indulge in substantive due process, that is, the recognition of rights which, although neither expressly nor implicitly set out in other Constitutional provisions, are nonetheless constitutionally protected because they are deeply rooted in "the traditions and collective conscience of our people."

This technique of recognizing unspecified personal rights was strongly criticized by Justice Black¹⁵⁹ on the grounds that it would:

require judges to determine what is or is not constitutional on the basis of their own appraisal of what laws are unwise or unnecessary . . .¹⁶⁰

and also that it would entice the present judiciary to repeat the pre-New Deal performance of their predecessors on the Supreme Court.

It has already been noted that the Canadian Supreme Court does not have such a "sordid" history to live down. However, even though there is admittedly a risk that the courts could use this power of judicial review to usurp the

¹⁵⁵ That procedural safeguards are enough is suggested by Hanks in *The Rights of Americans*, *supra* note 111, at 154.

¹⁵⁶ Note the argument put forward by Mains, *supra* note 76, that procedural rights by themselves may not be enough: "Without substantial public pressure governments are not likely to constitutionalise public rights that are intended to better scrutinize government activities."

¹⁵⁷ These are not meant to be exhaustive of possible rights inherent in s. 7.

¹⁵⁸ *Supra* pages to .

¹⁵⁹ Dissenting in *Griswold*.

¹⁶⁰ *Supra* note 48, at 511-12 (U.S.), 1696-1697 (S. Ct.).

legislative process as Justice Black suggested, surely it is even more dangerous in our increasingly bureaucratic society to concede the infallibility of the legislative and executive branches of government, and deny the courts their jurisdiction to protect and vindicate the personal rights of the citizen. Would not this latter course be a usurpation of the judicial process?

Unfortunately Justice Goldberg's argument has not been developed in the United States while in Canada the wording of section 26 would not appear to be strong enough to suggest the independent promulgation of such an approach. Indeed Professor Hogg suggests that:

[s]ection 26 does not incorporate . . . undeclared rights and freedoms into the Charter, or "constitutionalize" them in any other way.¹⁶¹

However, if one were to view a constitution¹⁶² in general and the Charter in particular as being liberal documents intended to embody traditional civil liberties and the conventional democratic process, and which are not to be strictly construed,¹⁶³ is it not legitimate to interpret section 26 as suggesting that other fundamental rights and freedoms that exist in Canada may, in a suitable case, be read as implicit in the appropriate provision of the Charter? Surely a constitution of this liberal tradition could never legitimately be applied to restrict ordinary rights and freedoms not expressly enumerated in the Charter. If this is true then section 26 would be redundant on Professor Hogg's strict interpretation.

On the analysis that section 26 permits rights not explicit in the Charter to be implied into appropriate express provisions, this lends support to the existence of such rights as those of health and bodily integrity, that is, they are inherent in section 7 and its express recognition of rights to life, liberty and security of the person.¹⁶⁴

This "penumbra" approach was also the one taken by the majority in *Griswold*¹⁶⁵ in which Justice Douglas giving the opinion of the court limited

¹⁶¹ *Supra* note 87, at 70.

¹⁶² At least those of western democracies.

¹⁶³ See text accompanying notes 79 and 80, *supra*.

¹⁶⁴ The existence of other rights in s. 7 is supported by the decision in *Re Fisherman's Wharf Ltd.* (1982), 40 N.B.R. (2d) 42 at 53 (N.B.Q.B.) *per* Dickson J.: "The Charter is silent in specific reference to property rights. In that circumstance it can only be assumed, in my view, that the expression 'right to . . . security of the person' as used in s. 7 must be construed as comprising the right to enjoyment of the ownership of property . . ."

This case emphasizes the judicial respect for private property rights but if such a wide interpretation is to be given to s. 7 Dickson J. will find it difficult to deny the existence of the right to health at least as being included in the penumbra of s. 7.

Note, however, that if this decision is followed it weakens the argument that because property rights are not constitutionally protected but life, liberty and security are then environmental concerns are *prima facie* more important in society.

Note also the statement by Dickson J. that "the right to enjoyment of property free from the threat of confiscation without compensation has unquestionably been a right traditionally enjoyed by Canadians and may therefore be considered a right embodied in our constitution . . ." at 54. Compare this to the analysis of s. 26 above.

See also *R. v. Robbin*, May 28, 1982, Que. Ct. Sess., Rousseau J. Sess. — s. 7 is a substantive rather than a procedural section.

¹⁶⁵ This argument was opposed by Justice Black for the same reasons he opposed Justice Goldberg's reasoning. But *c.f.* the difference between recognizing a right that has always existed in the Constitution and creating a new one.

the development of new constitutional rights to those implicit in expressed rights. He suggested also that recognition of these implicit rights was essential in order to make the *Bill of Rights* "fully meaningful" and to give "life and substance" to the Constitution. If one accepts this "it can be argued that a right to a healthful environment is an implicit premise of the Constitution; all other rights are meaningless without it."¹⁶⁶ Similarly, and with more chance of success, rights to health and to bodily integrity could be pleaded.

Finally, an argument for recognition of these personal rights can be made on the strength of arguments prevalent in Ireland which reflect the strong natural law tendency of the present Supreme Court. Thus, as quoted earlier,¹⁶⁷ some judges¹⁶⁸ have recently strongly supported natural law theories which place justice above the law and recognize the existence of "rights anterior to the law." If one accepts this philosophy¹⁶⁹ it is possible that a constitution need not expressly or implicitly recognize rights for judicial cognizance to be taken of them. They already exist independently of the Constitution. Modern dicta, however, base this natural law approach on express provisions of the Constitution itself and in particular the "impressive preamble":

In the Name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred,

We, the people of Eire,

Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial,

Gratefully remembering their heroic and unremitting struggle to regain the rightful independence of our Nation,

And seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations,

Do hereby adopt, enact and give to ourselves this Constitution.

Obviously the preamble to the Canadian Charter¹⁷⁰ is unlikely to catalyze a commensurate upsurge in natural law thinking among the Canadian judiciary nor is support for such a development afforded by other Charter provisions¹⁷¹ in the way other articles of the Irish Constitution support natural law philosophy.¹⁷² However, as a buttressing argument to the more concrete suggestions made above with respect to section 7 and section 26, one could argue that higher principles lie behind the Charter and that denial of a basic human right, even one not expressly enumerated, is fundamentally inconsistent with the rule of law and with the rule of law as expressed in the terms of the Canadian Constitution. The rights to health and to bodily integrity in particular are

¹⁶⁶ Hanks, *supra* note 111, at 153.

¹⁶⁷ See text accompanying note 104, *supra*.

¹⁶⁸ In particular Judges Walsh, Henchy and Kenny (the last named having recently retired).

¹⁶⁹ Needless to say its acceptance is not widespread. Indeed Hanks and Hanks point out that "existential philosophy" is the appropriate perspective to apply to the [U.S.] Constitution — there is no need to resort to the "occultism" of natural law theories [emphasis added]. Hanks et al., *supra* note 111.

¹⁷⁰ *C.f.* the more impressive preamble to the Canadian *Bill of Rights*.

¹⁷¹ Indeed to an extent the converse is true. Thus, s. 2(a) of the Charter provides not only for freedom of religion but also freedom of conscience — *i.e.* recognition is afforded to non-religious thinking.

¹⁷² See in particular Art. 40.3, 41, 42 and 43.

rights which should not be denied and indeed one need not resort to natural law philosophy to support their validity if one accepts that the intrinsic status and dignity of the individual *per se* can be a legitimate foundation of rights.

V. CONCLUSION

Both economic incentives and comprehensive legislative intervention are necessary devices to ensure adequate environmental protection. However, in conjunction with these, it is desirable and perhaps even necessary to ensure the recognition of some form of a constitutional right to a clean environment in order to develop an ethic which will focus public environmental concern, elevate public awareness, better define environmental issues, and catalyze the evolution of both the economic techniques and the legislative rights.

Such a constitutional right would probably serve to stimulate a more environmentally appreciative application and evolution of legal concepts by the judiciary, and would be particularly useful in this respect given the relaxed standing rules in constitutional cases.

It is unlikely that such a constitutional right will be adopted by amendment of the Constitution for, even though it is widely recognized as a fundamental right, the political and economic climate is not conducive to its enactment.

The alternative approach of recognizing such a right through the medium of judicial review pursuant to section 52 of the *Constitution Act, 1982*¹⁷³ would require a new judicial approach. To this end it is suggested that, notwithstanding the positivist tradition of the Canadian judiciary, the patriation of the Canadian Constitution should lead to active judicial review in light of the express provisions of the Constitution, initial judicial reaction, the general policy of liberal interpretation of constitutional documents and the analogy to the Irish experience since the enactment of its Constitution in 1937. However, it is unlikely that the courts would be prepared to go so far as to recognize a constitutional environmental right to a clean environment especially while judicial review is still in its infancy.

The American courts have baulked at the suggestion of just such a right and even though it has been argued that the reasons underlying this rejection have been far from compelling, the Canadian courts would be unlikely to differ on this issue. The main reason why such a right has been and would be rejected is judicial opposition to collectivist concepts which would vest rights in the public generally rather than in individuals. Undoubtedly such judicial opposition would be clothed in a legal argument, such as opposition to substantive due process, and for this reason, it is suggested, the right to a clean environment should not be strongly pressed lest other constitutional developments be foreclosed in the process.

Consequently there are two other constitutional roads which may be taken. The first, which might at the end of the day prove just as effective as any substantive right to a clean environment, is to demand procedural rights on the basis of section 7 of the Charter. Thus on environmental matters, which

¹⁷³ Sched. B of the *Canada Act 1982*, c. 11 (U.K.).

necessarily affect or are likely to affect our life, liberty or security of our persons, any member of the public should be entitled to demand full opportunity for public participation in environmental decision making. Before it can be said that the public has had such full opportunity, this might in turn require, *inter alia*, access to government information and improved standing before the courts.

Finally, there is the second and more radical approach which requires a rather activist interpretation of section 7 when read in conjunction with section 26. Thus principles of "fundamental justice" in section 7 can be read as meaning something more than conventional notions of natural justice, and section 26 grants additional authority for this proposition where it in turn is interpreted as safeguarding rights and freedoms not expressly protected by the Charter.

On this analysis it would be possible to claim a right to a clean environment. However, anticipating judicial opposition to this notion the same objective could be achieved in most environmental cases if one successfully claimed a right to bodily integrity or a right not to have one's health placed in jeopardy.

It is suggested that the recognition of such rights in Canada is entirely feasible because it is not argued that these rights would be unlimited. They are subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" and to quote Kenny J. of the Irish High Court in *Ryan v. A.-G.*:¹⁷⁴

When dealing with controversial social, economic and medical matters on which it is notorious views change from generation to generation [Parliament] has to reconcile the exercise of personal rights [with the prescribed limits] and its decision on the reconciliation should prevail unless it was oppressive to all or some of the citizens or unless there is no reasonable proportion between the benefit which the legislation will confer on the citizens or a substantial body of them and the interference with the personal rights of the citizen.¹⁷⁵

The problem with rights such as these, however, is that they are necessarily anthropomorphic in conception and are not directly pointed towards environmental protection. It is suggested, however, that although they consequently will not serve as so vigorous a catalyst for development of the environmental ethic as would the right to a clean environment, nevertheless they will still prove very useful and powerful weapons in the armoury of environmental protection.

¹⁷⁴ *Supra* note 102, at 312-13.

¹⁷⁵ *C.f.* Canada where even if the judiciary is manifestly wrong in its actions Parliament can still override the court's intervention if it has the political will — s. 33.